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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Encompass Group, L.L.C.

Serial No. 75/542,603

Robert B. Kennedy of Baker, Donelson, Bearman & Caldwell, for Encompass Group, L.L.C.

Reid M. Wilson, Trademark Examining Attorney, Law Office 113 (Meryl Hershkowitz, Managing Attorney).

Before Cissel, Seeherman and Hanak, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Encompass Group, L.L.C. (applicant) seeks to register SPIRAL SOFT in typed drawing form for "pillows for use in hospitality, institutional and medical facilities." The intent-to-use application was filed on August 26, 1998, and on August 3, 1999 applicant filed an amendment to allege use. At the request of the examining attorney, applicant disclaimed the exclusive right to use SOFT apart from the mark in its entirety.

Citing Section 2(d) of the Trademark Act, the examining attorney has refused registration on the basis that

applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark SPIRAL LOFT, previously registered in typed drawing form for "pillows." Registration Number 1,657,429. In this registration, registrant disclaimed the exclusive right to use LOFT apart from the mark in its entirety.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the examining attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the goods and the similarities of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the goods, they are legally identical. The description of goods of the cited registration is simply pillows, and this description is broad enough to include the specialized pillows set forth in the application. Canadian Imperial Bank of Commerce v.

Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1814 (Fed. Cir. 1987). Moreover, we note that in its briefs, applicant no longer argues that there is any difference in the goods. At page 3 of a paper dated September 22, 1999, applicant argued that its goods "are clearly different from those of the registrant. The registrant's goods [pillows] are intended for household use, while applicant's goods [pillows] are intended for use in hospitality, institutional and medical facilities." However, applicant did not reiterate this argument in its briefs. Indeed, at page 1 of its reply brief, it specifically disavowed the argument that registrant's pillows are "intended for household use." In sum, for the purposes of this proceeding, we must consider that applicant's pillows and registrant's pillows are legally identical.

Considering next the marks, we note at the outset that when the goods of the parties are identical as is the case here, "the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). This is particularly true when not only are the goods identical, but

in addition they are inexpensive items such as pillows. See Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984) and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Marks are compared in terms of visual appearance, pronunciation and meaning. In terms of visual appearance and pronunciation, we find that the two marks are extremely similar. Both marks consist of two words; the first word in both marks (SPIRAL) is identical; and the second word in both marks consists of four letters with the last three letters (OFT) being identical. In short, the only difference between the two marks is the first letter of the second word.

Given the very slight differences in the two marks, consumers viewing the two marks could well not even notice the difference. Of course, it need hardly be said that the test for likelihood of confusion is not one of comparing the two marks next to each other. Thus, a consumer familiar with registrant's SPIRAL LOFT pillows, upon later encountering applicant's SPIRAL SOFT pillows, would be even less likely to distinguish the two marks.

Likewise, in terms of pronunciation, the two marks are extremely similar. The first word is, as previously noted, absolutely identical, and the second words (LOFT and SOFT) rhyme. Again, it must be noted that in deciding whether there is a likelihood of confusion, the proper test is not one of comparing the marks next to each other. A consumer hearing about registrant's SPIRAL LOFT pillows and then later hearing about applicant's SPIRAL SOFT pillows could easily assume that there was no difference in sound or pronunciation between the two marks.

Finally, we turn to a consideration of the meaning of the two marks. However, before doing so, we wish to note that, in appropriate cases, similarity as to any one factor (visual appearance, pronunciation or meaning) may be sufficient for a finding of likelihood of confusion. Krim-Ko Corp. v. Coca-Cola Co., 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968). An appropriate case for finding likelihood of confusion based on similarity as to just one factor is where the goods are not only legally identical, but in addition they are inexpensive. Thus, even if we were to accept applicant's argument that its mark SPIRAL SOFT and registrant's mark SPIRAL LOFT have different meanings, we

nevertheless would find that there exists a likelihood of confusion given the fact that the goods are identical, inexpensive items and the fact that the two marks are so extremely similar in terms of visual appearance and pronunciation.

At the outset, we acknowledge that the primary meanings of the words "soft" and "loft" are different in that the latter word typically refers to "an attic or atticlike space." Webster's New World Dictionary (1975). However, the examining attorney has referenced other definitions of these words taken from The American Heritage Dictionary of the English Language (3d ed. 1992). The sixth definition of the word "loft" is as follows: "a. the thickness of a fabric or yarn. b. the thickness of an item, such as a down comforter, that is filled with compressible insulating material." This definition of the word "loft" bears some similarity to the third definition of the word "soft" which is : "smooth or fine to the touch: a soft fabric."

It must be remembered that the common purchasers of applicant's goods and registrant's goods would be those who purchase pillows for hospitality, institutional and medical facilities. These are not just typical purchasers. Rather,

at least some of these specialized purchasers may well be familiar with this other definition of the word “loft” which is at least somewhat similar to one definition of the word “soft.”

In any event, as previously noted, we would find that there exists a likelihood of confusion even if the meanings of the two marks were dissimilar.

Decision: The refusal to register is affirmed.